UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GREYSTONE COMMUNITY REINVESTMENT ASSOCIATES, INC. Plaintiff,	:	
v.	:	Civil Action No. 3:00CV871(CFD)
FIRST UNION NATIONAL BANK, Defendant.	:	

RULING

Pending is the Motion for Leave to Amend Complaint [Doc. # 43] filed by plaintiff Greystone Community Reinvestment Associates, Inc. ("Greystone"). For the following reasons, the motion is GRANTED IN PART, DENIED IN PART.

Given that defendant First Union National Bank ("First Union") already has served a responsive pleading, the plaintiff may amend its complaint only upon leave of the court or upon the consent of the opposing party. Fed. R. Civ. P. 15(a). Under Rule 15, "leave shall be freely given when justice so requires." Id.; see also Rachman Bag Co. v. Liberty Mut. Ins. Co., 46 F.3d 230, 234 (2d Cir. 1995). However, a court may exercise its discretion to deny amendment based upon the following factors: undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of the amendment. Foman v. Davis, 371 U.S. 178, 182 (1962). First Union argues that Greystone should not be permitted to amend because the amendment is futile and because its untimeliness would prejudice First Union.

Greystone's proposed Third Amended Complaint materially differs from its Second Amended Complaint in two principal ways: it seeks to add several facts regarding First Union's

communications with Bear Stearns, and it reinstates Count Eight under the Connecticut Unfair Trade Practices Act ("CUTPA"), which it had previously withdrawn without prejudice. First Union does not specifically address the additional facts to be included in the Third Amended Complaint; its futility argument focuses on Count Eight. It argues that Greystone's CUTPA count fails as a matter of law, and thus is futile, because: (1) it improperly bases a CUTPA claim on violations of federal securities laws, (2) its allegations of securities violations must fail, and (3) it improperly pleads a CUTPA claim when the confidentiality agreement at issue in this case contains a New York choice-of-law provision.

It is clear that CUTPA is not applicable to the sale of securities. Russell v. Dean Witter Reynolds, Inc., 510 A.2d 972, 974-79 (Conn. 1986). Accordingly, Count Eight will not be allowed to the extent that it is based on the purchase of securities. However, while the plaintiff bases Count Eight on First Union's alleged use of confidential information "in connection with the purchase and sale of its competing CRA Securitization," Third Am. Compl. at ¶ 70, Greystone also incorporates the preceding paragraphs of the Third Amended Complaint, which allege breach of contract, breach of fiduciary duty, unjust enrichment, breach of confidentiality agreement, and several counts of misrepresentation. At least one Connecticut court has concluded that a CUTPA claim cannot be based on common law tort causes of action when the claims are all based on the same factual allegations of a fraudulent securities transaction, to which CUTPA does not apply. Champaigne v. Scarso, No. CV 970238470, 1999 WL 732516, at *2 (Conn. Super. Ct. Aug. 26, 1999). The Court cannot conclude at this stage that the other causes of action have such a relationship to the allegations of securities fraud. See Nuclear Mgmt. Corp. v. Combustion Eng'g, Inc., No. 3:94CV00403(WWE), 1997 WL 43099, at * 5 n.1 (D. Conn. Jan. 22, 1997)

(identifying, but not reaching the issue of whether the rule in Russell should apply to claims of tortious interference despite the fact that they involve securities).

As to the defendant's argument that Count Eight should not be allowed because the confidentiality agreement at issue contains a New York choice-of-law provision, enforcement of a broadly-worded choice-of-law provision may govern interpretation of the contract and tort claims arising out of the contract, thus warranting dismissal of CUTPA claims. See BRM Indus., Inc. v. Mazak Corp., 54 F. Supp. 2d 131, 133 (D. Conn. 1999); Travel Servs. Network, Inc. v. Presidential Fin. Corp., 959 F. Supp. 135, 146 (D. Conn. 1997). However, a narrow choice-of-law provision may not apply to related non-contract claims, a result which would permit CUTPA claims based on those allegations. See Messler v. Barnes Group, Inc., No. CV 960560004, 1999 WL 61034, at *9-10 (Conn. Super. Ct. Feb. 1, 1999) (citing cases). According to the Third Amended Complaint, the choice-of-law provision in the confidentiality agreement provides that the agreement "shall be governed and construed in accordance with the laws of the State of New York." Third Am. Compl. ¶ 14. Given that the plaintiff's CUTPA claims appears to be based on its tort claims as well as breach of contract claims, the Court cannot conclude at this time that the plaintiff has failed to state a claim under CUTPA.

Moreover, the Court also has considered the alleged prejudice to First Union if the amendment is permitted. First Union argues that it will suffer prejudice because it would require further discovery on the plaintiff's allegations of securities law violations, particularly given that discovery the final phase of discovery–depositions of expert witnesses–is scheduled to close on February 1, 2002. It also maintains that it would be prejudiced because Greystone had earlier withdrawn the CUTPA claim. These claims of prejudice, however, are linked to Greystone's

attempt to assert its CUTPA claim on the basis of securities law violations. Given that the Court will not permit amendment on that basis, there appears to be no other prejudice claimed by First Union.

Accordingly, the Court concludes that the amendment is not futile, and the motion to amend is GRANTED IN PART, DENIED IN PART. This is without prejudice to the defendant moving for summary judgment. Greystone is directed to file a revised Third Amended Complaint in accordance with this ruling, by **February 15, 2002**. Either party may move to extend the discovery period as a result of this ruling.

SO ORDERED this 25th day of January 2002, at Hartford, Connecticut.

/s/
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE